

Gregg W. Zive

Honorable Gregg W. Zive
United States Bankruptcy Judge



Entered on Docket
April 25, 2016

JOHN MURTHA, ESQ
NEVADA BAR 0835
WOODBURN AND WEDGE
Sierra Plaza
6100 Neil Road, Ste. 500
Post Office Box 2311
Reno, Nevada 89505
Telephone: 775-688-3000
Facsimile : 775-688-3088
jmurtha@woodburnandwedge.com
sjadams@woodburnandwedge.com

Attorneys for Trustee
William A. Leonard, Jr.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

Case No. BK-13-51237-GWZ
Chapter 7

PAUL A. MORABITO
Debtor.

**ORDER GRANTING TRUSTEE'S
MOTION TO COMPEL ATTORNEYS
TO TURN OVER OR DISCLOSE
RECORDED INFORMATION TO
THE TRUSTEE (11 U.S.C. § 542(e))**

Hearing Date: 04/05/2016
Hearing Time: 2:00 p.m.

_____/

This matter came before the Court on the 5th day of April, 2016, on the Trustee's
Motion to Compel Attorneys to Turn Over or Disclose Recorded Information to the

1 Trustee (11 U.S.C. § 542(e)) filed on February 3, 2016 (Docket No. 509) (the "Motion");
2 the following oppositions to the Motion were filed:

- 3 1. Objections to (1) Trustee's Motion to Turnover or Disclose
4 Recorded Information (Lippes) and (2) Trustee's Motion to
5 Turnover Recorded Information (Robison) filed by Edward Bayuk
6 ("Bayuk") and The Jackson Hole Trust Company, as Trustee of The
Meadow Farms Irrevocable Trust ("Jackson Hole") March 23, 2016
(Docket No. 578) (the "Bayuk Opposition"); and
- 7 2. Virsenet, LLC's Opposition to the Trustee's Motions to Compel
8 Attorneys to Turn Over or Disclose Recorded Information to the
9 Trustee (11 U.S.C. § 542(e)) (ECF Nos. 509, 510) filed by Virsenet,
10 LLC ("Virsenet") on March 24, 2016 (Docket No. 582) (the "Virsenet
Opposition");

11 collectively the "Oppositions"; the Trustee filed an Omnibus Reply In Support of Motions
12 to Compel on March 29, 2016 (Docket No. 587) (the "Reply"); it appearing from the
13 record that notice of the hearing on the Motion has been given as required by law;
14 appearances were made at the hearing as reflected on the record thereof; the Court
15 having considered the Motion and the exhibit attached thereto, the Oppositions and the
16 Reply as well as the presentations and arguments of counsel made at the hearing; the
17 Court finds and concludes that:

18 1. Although the Oppositions advance arguments in relation to a companion
19 motion filed by the Trustee (Docket No. 510), this Order addresses only the Motion
20 (Docket No. 509).

21 2. An involuntary petition commencing this case was filed on June 20, 2013
22 (the "Petition Date").

23 3. Pursuant to the Motion, the Trustee sought an order directing Lippes
24 Mathias Wexler Friedman, LLP, a Buffalo, NY, based law firm ("Lippes"), to turn over all
25 of its client files relating to its representation of the Debtor prior to the Petition Date in
26 connection with any of the following persons or entities under the authority of 11 U.S.C.
27 § 542(e):
28

1
2 VTS Communications, LLC Virsenet, LLC
3 **(Collectively referred to herein as the "Virsenet Files")**
4

5 Edward Bayuk The Meadow Farms Irrevocable Trust
6 Page Top, LLC USHF Cellular Communications
7 Shipcom, LLC Robert S. Block
8 The Robert S. Block Family Trust Rene Steigler III
9 Tim McEvoy Raymond Whiteman
10 Jacobs Holdings, LLC CD Holding Co., LLC
11 JJ/CD Capital, LLC Bank of America, N.A.
12 The Sefton Trust Sefton Trustees
13 The Arcadia Living Trust Salvatore Morabito

14 **(Collectively referred to herein as the "Lippes Files")**

15 4. Neither the Debtor nor Lippes opposed the Motion.

16 5. Bayuk, Jackson Hole and Virsenet were the only parties in interest that
17 opposed the Motion.

18 6. No party in interest, including, but not limited to, the Debtor, Lippes, Bayuk,
19 Jackson Hole and Virsenet filed a privilege log in which they identified documents in the
20 Virsenet Files or the Lippes Files that could be subject to a claim of privilege.

21 7. 11 USC § 542(e) provides that:

22
23 Subject to any applicable privilege, after notice and a hearing,
24 the court may order an attorney, accountant, or other person that holds
25 recorded information, including books, documents, records, and
26 papers, relating to the debtor's property or financial affairs, to turn over
27 or disclose such recorded information to the trustee.

28 8. The Virsenet Files and the Lippes Files are property of the Debtor's estate
under the authority of 11 U.S.C. § 541.

1 9. A person or entity that holds recorded information, including books,
2 documents, records, and papers, relating to the debtor's property or financial affairs
3 subject to turnover under the provisions of 11 U.S.C. § 542(e) may claim a privilege,
4 but any files or documents that are not subject to a claim of privilege must be turned
5 over to a trustee upon demand.

6 10. To the extent any recorded information, books, documents, records and
7 papers in the Virsenet Files or the Lippes Files are not subject to a claim of privilege,
8 they must be turned over to the Trustee.

9 11. The Debtor is the only person that has standing to claim his individual
10 attorney-client privilege with Lippes in relation to the Virsenet Files and the Lippes Files.
11 The Debtor did not oppose the Motion. Accordingly, to the extent any of the recorded
12 information, books, documents, records and papers in the Virsenet Files and the Lippes
13 Files could have been protected by an individual claim of attorney-client privilege
14 between the Debtor and Lippes, the claim is waived. The Debtor cannot waive a
15 privilege belonging to any other person or entity.

16 12. To the extent any recorded information, books, documents, records and
17 papers in the Virsenet Files and the Lippes Files may have been subject to an individual
18 claim of attorney-client privilege between the Debtor and Lippes, they must be turned
19 over to the Trustee.

20 13. In the Motion, the Trustee argued the attorney-client privilege between the
21 Debtor and Lippes never attached because of the crime-fraud exception to the attorney-
22 client privilege.

23 14. The Court is not making any findings or conclusions as to whether the
24 crime-fraud exception applies to any communications between Lippes and Virsenet,
25 Bayuk or Jackson Hole.

26 15. The Oppositions argued that any communications among the Debtor,
27 Virsenet, Bayuk, Jackson Hole and Lippes are protected by the joint defense privilege
28 or the common interest privilege (the "Common Interest Privilege").

1 16. No person or entity other than Virsenet, Bayuk or Jackson Hole has
2 asserted a claim of a Common Interest Privilege in this case relating to Lippes' pre-
3 petition representation of the Debtor.

4 17. To be eligible for protection under a Common Interest Privilege, the
5 communications sought to be protected must be shared with the attorney for the
6 community and all members of a community must share a common legal interest in the
7 shared communication. *In re Teleglobe Communications Corporation*, 493 F. 3d 345,
8 364 (3rd Cir. 2007).

10 18. A wide variety of circumstances are relevant to the determination of
11 whether two or more parties intend to create a joint-client relationship, but the keys to
12 deciding the scope of a joint representation are the parties' intentions and expectations.
13 *Id.* at 363 (citing *Sky Valley Ltd. P'ship v. ATX Sky Valley Ltd.*, 150 F.R.D. 648, 652-53
14 (N.D. Cal. 1993)).

16 19. Because no party provided the Court with a privilege log for any
17 communications that may be reflected in the Virsenet Files or the Lippes Files, it is not
18 possible for this Court to determine, at this time, whether a Common Interest Privilege
19 exists among the Debtor, Virsenet, Bayuk, Jackson Hole and Lippes.

20 20. Even if a Common Interest Privilege may exist, "the great caveat of the
21 joint-client privilege is that it only protects communications from compelled disclosure to
22 parties outside the joint representation. When former co-clients sue one another, the
23 default rule is that all communications made in the course of the joint representation are
24 discoverable." *In re Teleglobe Communications Corporation*, 493 F.3d 345, 366 (3rd Cir.
25 2007). Thus, when parties formerly under a joint-client privilege become adverse, the
26 privilege no longer applies to any of their communications. *In re Hotels Nevada, LLC at*
27 *571-572 (quoting Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Comm'ns Corp.), 493*
28 *F.3d 345, 366 (3d Cir. 2007).* Except as provided herein the Court is not making any
findings regarding claims of common interest privilege.

1 21. At this time the Trustee is not adverse to Virsenet.

2 22. Because the Trustee is not adverse to Virsenet and Virsenet has the right
3 to claim any applicable privilege in relation to its communications with Lippes subject to
4 the Court's *in camera* review, Virsenet should be given an opportunity to review the
5 Virsenet Files for privileged materials before they are delivered to the Trustee.

6 23. The Trustee is adverse to Bayuk and Jackson Hole.

7 24. By reason of the adversity as between the Trustee and Bayuk and the
8 Trustee and Jackson Hole, any Common Interest Privilege that may have protected the
9 communications among Lippes, the Debtor, Bayuk and Jackson Hole are discoverable
10 by the Trustee who has stepped into the shoes of the Debtor.

11 25. The contents of legal files created during the course of a joint
12 representation belong jointly to the clients with each having an undivided ownership
13 interest in them. *In re Kaleidoscope, Inc.*, 15 B. R. 232, 244 (Bk. Ct. N. D. Ga., 1981).

14 26. In addition the findings and conclusions set forth above, the Court
15 incorporates such additional findings and conclusions that were set forth on the record
16 of the hearing in accordance with the provisions of FRCP 52 incorporated by FRBP 7052
17 and 9014(c) the same as if they were set forth in their entirety herein.

18 Now, therefore, good cause appearing,

19 IT IS HEREBY ORDERED that:

20 A. The Motion is GRANTED as provided herein.

21 B. Within fourteen (14) days following the Trustee's service of this Order upon
22 Lippes, it shall deliver the originals of all of the Lippes Files to the Trustee's counsel at
23 the following address:

24 John F. Murtha, Esq.
25 Woodburn and Wedge
26 6100 Neil Road, Suite 500
27 Reno, Nevada 89511

28 If Lippes desires to make copies of the Lippes Files before delivering them to the
Trustee, it may do so at its expense.

1 C. The Trustee shall advise Virsenet's counsel of the time and manner of
2 service of this Order upon Lippes. Within twenty-eight (28) days following the Trustee's
3 service of this Order upon Lippes, Virsenet may either make arrangements to review the
4 Virsenet Files or make copies of them, at Virsenet's expense, so that it may identify any
5 documents in the Virsenet Files that it believes are subject to its attorney-client privilege
6 with Lippes.
7

8 D. If Virsenet believes any documents in the Virsenet Files are protected by
9 its attorney-client privilege with Lippes, it shall, within the twenty-eight (28) day period
10 set forth in Paragraph C, above, prepare a privilege log that shall identify:

- 11 1. The attorney(s) and client(s) involved in the claimed privileged
12 communication;
- 13 2. The nature of the document claimed to contain privileged
14 information;
- 15 3. All persons or entities shown on the document to have received or
16 sent the document;
- 17 4. All persons or entities known to have been furnished the documents
18 or informed of its substance;
- 19 5. The subject matter of the claimed privileged communication;
- 20 6. The date the document was generated, prepared or dated; and
- 21 7. Any other information Virsenet wishes to include in the privilege log
22 that it believes may be helpful in establishing its privilege claims.

23 E. At the conclusion of Virsenet's 28 day review period, it shall file its privilege
24 log with the Court and serve it upon Lippes, the Trustee, the Debtor, Bayuk and Jackson
25 Hole.

26 F. As soon as Lippes receives the privilege log from Virsenet, it shall deliver
27 the originals of all of the recorded information, books, documents, records and papers
28 in the Virsenet Files that are not listed in Virsenet's privilege log to the Trustee's counsel

1 at the address indicated in Paragraph A, above. If Lippes desires to make copies of the
2 non-privileged documents in the Virsenet Files it may do so at its expense.

3 G. Within fourteen (14) days following the filing and service of the Virsenet
4 privilege log, any party in interest may file a statement with the Court indicating whether
5 any of the documents listed on the privilege log should or should not be declared to be
6 privileged with specific reasons supporting their position.
7

8 H. The Court, after reviewing the Virsenet privilege log and any objections
9 thereto, may direct Virsenet to file any of the claimed privileged documents with the
10 Court, under seal, for an *in camera* inspection.

11 I. Regardless of whether the Court orders Virsenet to file any documents
12 under seal or not, the Court shall enter an order listing all documents in the privilege log
13 that may be withheld from delivery to the Trustee on the ground that they are privileged
14 and all documents that must be delivered to the Trustee notwithstanding Virsenet's claim
15 of privilege.
16

17 J. Within seven (7) days after the Trustee's service of the Court's order
18 identifying which documents in the Virsenet Files are protected by Virsenet's attorney-
19 client privilege upon Lippes, Lippes shall deliver all of the original documents in the
20 Virsenet Files found by the Court not to be protected by an attorney-client privilege to
21 the Trustee's counsel at the address listed in Paragraph A, above. Lippes may, at its
22 expense, make copies of the documents prior to delivery to the Trustee's counsel.
23

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25 ///

26 ///

1 K. Should a document be inadvertently produced by any party that has a
2 privilege for any reason it shall be returned to the party that inadvertently produced it
3 and will not be used by the Trustee or any other party for any reason in the litigation.
4

5 Prepared by:

6
7 WOODBURN AND WEDGE
8 John F. Murtha, Esq.,
9 Attorneys for the Trustee
William A. Leonard, Jr.

10 Approved/Disapproved this 19th day of April, 2016.

11 ROBISON, BELAUSTEGUI, SHARP & LOW

12
13 By /s/ Frank C. Gilmore, Esq.
14 Frank C. Gilmore, Esq.
15 Attorneys for Debtor

16 Approved/Disapproved this 19th day of April, 2016.

17 WALTER WILHELM BAUER

18
19 By /s/ Holly E. Estes, Esq.
20 Holly E. Estes, Esq.
21 Attorneys for Edward Bayuk and
The Jackson Hole Trust Company

22 Approved/Disapproved this 19th day of April, 2016.

23 KAEMPFER CROWELL

24
25 By /s/ Janet L. Chubb, Esq.
26 Janet L. Chubb, Esq.
27 Attorneys for Virsenet, LLC

ALTERNATIVE METHOD RE: RULE 9021

In accordance with Local Rule 9021, counsel submitting this document certifies as follows: (check one):

 The Court waived the requirements of approval under LR 9021.

 X This is a chapter 7 or 13 case, and either with the motion, or at the hearing, I have delivered a copy of the proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

Counsel who approved the order:

Janet L. Chubb, Esq.
Kaempfer Crowell
50 W. Liberty St. #700
Reno, NV 89501

Frank C. Gilmore, Esq.
Robison Belaustegui Sharp & Low
71 Washington Street
Reno, NV 89509

Holly E. Estes, Esq.
Walter Wilhelm Bauer
205 E. River Park Cir. #410
Fresno, CA 93720

Counsel who disapproved the order:

Counsel who did not respond:

 This is a chapter 9, 11 or 15 case, and I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

Counsel who approved the order:

Counsel who disapproved the order:

Counsel who did not respond:

 I certify that there were no appearances or oppositions at the hearing.



John F. Murtha, Esq.

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